

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

PATRICK HATELY,

Plaintiff,

v.

Case No.: 1:16cv1143-GBL/MSN

NICOLE TORRENZANO,

Defendant.

**DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFF'S
MOTION FOR SCHEDULING ORDER MODIFICATION**

COMES NOW, Defendant NICOLE TORRENZANO, by counsel, and in response to Plaintiff PATRICK HATELY's Motion for Scheduling Order Modification [Docket No. 35], respectfully submits the following Brief in Opposition:

The Court should deny Mr. Hately's Motion to modify the Court's Rule 16(b) Scheduling Order. There is no cause to extend the discovery deadlines in this case. Any issues Mr. Hately has had in his trial preparation are of his own making. Mr. Hately has failed to diligently pursue discovery or follow up with respect to the issues that are alleged have occurred in his gathering of discovery from third parties. He also did not diligently pursue his request to extend discovery in this case, waiting until February 17, 2017 to file, and then failed to set a hearing date on the Motion.

Pursuant to Local Civil Rule 16(b):

"The parties and their counsel are bound by the dates specified in any [Rule 16(b) Scheduling Orders] and no extensions or continuances thereof shall be granted in the absence of a showing of good cause. Mere *failure on the part of counsel to proceed promptly with the normal processes of discovery shall not constitute good cause for an extension or continuance.*"

Ms. Torrenzano submits that the sole reason for his request for extension is Mr. Hately's failure to promptly proceed and follow up with normal discovery processes.

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Mr. Hately filed his initial Complaint on September 7, 2016. On October 25, 2016 the Court entered an Order [Docket No. 13] which provides the following relevant provisions: (i) the parties were ordered to develop a discovery plan to complete discovery by March 10, 2017; (ii) discovery was permitted to begin as of October 25, 2016; (iii) a final pretrial conference is ordered to be held on March 16, 2017.

On November 2, 2016, the parties submitted an agreed Rule 26(f) Joint Discovery Plan [Docket No. 19], which was adopted by the Court in its November 4, 2016 Rule 16(b) Scheduling Order [Docket No. 20]. In accordance with the Court's October 25, 2016 Order, the parties' Joint Discovery plan set March 10, 2017 as the discovery cut-off date.

It appears that Mr. Hately attempted to mail several third party subpoenas in mid-December 2016. Ms. Torrenzano does not believe that these were properly served. Mr. Hately has not shown proof of service and has not produced any costs in discovery indicative of having served any one of them. Several of the subpoenas, assuming they were served properly, are deficient as to the third parties because they ask for document production in Washington, D.C., a place far without the 100-mile limit imposed by Fed. R. Civ. P. 45(c)(2) for some of the third parties. For example: Google is located in California; Facebook is located in California; Microsoft is located in Washington state, etc. Ms. Torrenzano submits that if any of these parties have not responded to subpoenas, it is because they were not properly served, and/or because they improperly requested documentation production in contravention of the Rules.

Moreover, Ms. Torrenzano issued document requests to Mr. Hately seeking copies of all correspondence between Mr. Hately's counsel and subpoenaed third parties. Mr. Hately has produced no documentation indicative of attempts to follow up with any of the allegedly deficient subpoenaed parties.

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In addition, Mr. Hately has not proffered what information he expects to receive from any of these third parties that will be pertinent to the issues in this case.

Mr. Hately also waited to issue discovery requests to Ms. Torrenzano until January 4, 2017. Ms. Torrenzano timely laid her objections on January 19, 2017 and properly responded to discovery requests on February 13, 2017¹, per an agreement with Mr. Hately's counsel.

With respect to Mr. Hately's complaint that Ms. Torrenzano claimed her privilege under the Fifth Amendment in response to discovery requests, Mr. Hately was aware of this when Ms. Torrenzano timely noted her intent to plead the Fifth in her discovery objections served on January 19, 2017.

Although he complains of non-responsive third parties, Mr. Hately has not filed any motions to compel in this case. When Mr. Hately filed his Motion to Modify the Scheduling Order on February 17, 2017, he made no effort to docket the matter for hearing. It was Ms. Torrenzano's counsel who docketed this Motion for hearing, after Mr. Hately's counsel indicated that March 17, 2017 (after discovery is closed) was their available motions day.

Mr. Hately further attempts to rely on his proposed Second Amended Complaint as a reason to extend discovery. The Court's Rule 16(b) Scheduling Order provides that "Any motion to amend the pleadings or to join a party must be made as soon as possible after counsel or the party becomes aware of the grounds for the motion." At the very least, Mr. Hately was aware of the alleged grounds for adding a new party and amending his Complaint as of January 19, 2017, when he emailed defense counsel indicating an intent to join a new party and file an amended complaint. Despite this, Mr. Hately did not file a Motion for Leave to Amend [Docket No. 33] until February

¹ Ms. Torrenzano has filed a separate Motion for Rule 37 Sanctions and/or Motion to Compel [Docket Nos. 39-40] against Mr. Hately for his improper discovery production.

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13, 2017, and he did not docket his motion for a hearing at all. As with this Motion to Modify the Scheduling Order, it was defense counsel who had to docket Mr. Hately's Motion for Leave to Amend.

As of the date of hearing on the subject Motion, discovery will be closed in this case. Ms. Torrenzano requests that the Court deny Mr. Hately's request to extend discovery.

In conclusion, Mr. Hately has failed to diligently pursue the alleged issues that have occurred in his gathering of discovery and he has failed to diligently pursue an amendment to the Court's Rule 16(b) Scheduling Order.

WHEREFORE, Defendant NICOLE TORRENZANO respectfully requests that this Court enter an order denying Mr. Hately's Motion for Scheduling Order Modification and awarding to Ms. Torrenzano such other and further relief as the Court deems necessary and just given the circumstances of this matter.

Respectfully submitted,

NICOLE TORRENZANO
Defendant
By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2017, I served the foregoing Defendant's Brief in Opposition to Plaintiff's Motion for Scheduling Order Modification via CM/ECF, which will serve it on all parties of record, including:

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